

Interrogatory No. 46:

Identify the pole attachment rental rates paid by Gulf Power to other joint user pole owners, the specific amount of pole space leased by Gulf Power from such joint users, and explain the methodologies, if any, used to calculate these rates.

Gulf Power's Response:

Gulf Power's response consists of one chart listing pole space leased from joint users.

Complainants' Argument:

Gulf Power's response is incomplete. Although Gulf Power provided data about pole space, it provided no response at all to Complainants' request that Gulf Power explain the pole rates paid by Gulf Power to other joint users or its request that Gulf Power explain the methodologies used to calculate the rates it pays joint pole users. Accordingly, Gulf Power has a duty to answer the question as it pertains to both the pole rates it pays joint users and the methodologies used to calculate the rates it pays joint pole users.

Interrogatory No. 47:

Describe and explain Gulf Power's understanding of the Current Replacement Cost Approach as highlighted in Gulf Power's December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," and explain Gulf Power's application of this approach to calculating pole attachment rental rates.

Gulf Power's Response:

The Current Replacement Cost Approach, which is a recognized fair market value proxy, looks to the current cost of reproducing the property. It relies on current costs, unlike the Cable Rate and Telecom Rate which rely on disfavored historic costs. Gulf Power will explain its application of the Current Replacement Cost Approach when it discloses its experts in accordance with the Presiding Judge's March 30, 2005 Order.

Complainants' Argument:

Gulf Power's response is evasive and incomplete. Apart from stating the obvious – that the Current Replacement Cost approach "looks to the current cost of reproducing the property" –

Gulf Power utterly refuses to answer this interrogatory at this time. Apparently, once again, Gulf Power is attempting to avoid answering an important question until a time at or near the close of discovery. *See* March 30, 2005 Order (re-setting the date for disclosure of expert summaries as November 18, 2005). In its December 3, 2004 “Preliminary Statement on Alternative Cost Methodology,” Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the “Current Replacement Cost Approach.” Complainants are entitled to have this interrogatory, which asks for Gulf Power’s explanation and application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

Interrogatory No. 48:

Describe and explain Gulf Power’s understanding of the Federal Concessions Leasing Model as highlighted in Gulf Power’s December 3, 2004 “Preliminary Statement on Alternative Cost Methodology,” and explain Gulf Power’s application of this model to calculating pole attachment rental rates.

Gulf Power’s Response:

The Federal Concessions Leasing Model is a valuation method proposed by Gulf Power’s valuation experts. It uses the Federal government’s own methodology for valuing property for which there is no market, or which does not have an easily ascertainable market value. Gulf Power will explain its application of the Federal Concessions Leasing Model when it discloses its experts in accordance with the Presiding Judge’s March 30, 2005 Order.

Complainants’ Argument:

Gulf Power’s response is evasive and incomplete. Apart from stating the obvious – that the Federal Concessions Leasing Model “uses the Federal government’s own methodology for valuing property” that cannot easily be valued – Gulf Power utterly refuses to answer this interrogatory at this time. Apparently, once again, Gulf Power is attempting to avoid answering an important question until a time at or near the close of discovery. *See* March 30, 2005 Order

(re-setting the date for disclosure of expert summaries as November 18, 2005). In its December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the "Federal Concessions Leasing Model." Complainants are entitled to have this interrogatory, which asks for Gulf Power's explanation and application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

## **II. GULF POWER'S RESPONSES TO NUMEROUS DOCUMENT REQUESTS ARE INCOMPLETE**

### Document Request No. 1:

Produce all documents referring to, relating to, or regarding any of the facts or allegations described in Gulf Power's or the Complainants' pleadings in File No. PA 00-004 and this Action.

### Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Gulf Power is either producing herewith, or making available for inspection and copying upon reasonable notice, a substantial number of documents responsive to this request.

### Complainants' Argument:

Gulf Power's partial objections of relevance and overbreadth are not well-taken. First, the interrogatory clearly calls for relevant documents, since it is specifically directed at facts and allegations in Gulf Power's and Complainants' pleadings in this action. Second, while the scope of the interrogatory is broad, it is not *overly* broad since it focuses directly on getting at the documents underlying the allegations in the parties' pleadings. Moreover, Gulf Power has not provided any reason to support its objection of overbreadth, and Complainants have no way of

knowing what documents Gulf Power is withholding. Accordingly, Gulf Power's objection should be overruled and it should be required to produce all responsive documents.

Document Request No. 3:

Produce all documents reviewed by, or produced or written by, any consultant, expert witness, or other entity that Gulf Power has used or is using to study or report upon Gulf Power poles containing attachments by Complainants.

Gulf Power's Response:

Gulf Power will work with complainants to reach on agreed-upon a reasonable scope of expert discovery, and produce such agreed-upon documents at the appropriate time. Gulf Power already has produced, and filed of record, the Statement of Work between Osmose Utilities Services, Inc. ("Osmose") and Gulf Power. Gulf Power also has consulted with a valuation expert, who has been given materials and has prepared certain written materials for review by Gulf Power's counsel.

Complainants' Argument:

Gulf Power's answer is evasive and incomplete. It has essentially refused to answer this document request, and appears to be seeking, as it has with many of its responses to Complainants' interrogatories, to defer responding to this request until a time at or near the close of discovery. Gulf Power should be required to produce now all materials reviewed by any consultant or expert witness who it currently anticipates will testify in this case, and, at a time approved by the Presiding Judge, any materials produced or written by such consultant or expert witness relating to Gulf Power poles containing Complainants' attachments.

Document Request No. 4:

Produce all documents referring to, relating to, or regarding any communication, whether oral, written or otherwise, concerning annual pole rental charges or the performance of make-ready work, from January 1, 1998 to the present, on poles owned or controlled by Gulf Power between Gulf Power and any other person, including but not limited to, Complainants, other cable operators, telecommunications carriers, or any other entity attached to poles owned or controlled by Gulf Power. Your response should include documents that identify all such make-ready work performed, including installed equipment, subcontracts,

service requests, work orders, time sheets, material costs and site diagrams or maps.

Gulf Power's Response:

Gulf Power object to this request for production on the grounds that it is overly broad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving these objections, Gulf Power will, upon reasonable notice, make available for inspection and copying, all requested make-ready work orders. See also the documents produced in response to interrogatory numbers 40 and 42.

Complainants' Argument:

Gulf Power's partial objections of relevance, burden, and overbreadth are not well-taken. First, the interrogatory clearly calls for relevant documents, since it is specifically directed at production of documents pertaining to annual pole rental charges and make-ready work on Gulf Power poles. Second, while the scope of the interrogatory is broad, it is not *overly* broad since it focuses on getting at the documents underlying Gulf Power's claims that it is not sufficiently compensated for Complainants' attachments by the annual pole rent and make-ready fees paid by Complainants. In its Description of Evidence, Gulf Power stated that it had un-reimbursed costs, and further implied that, because third parties were willing to pay higher annual pole rental charges than Complainants' pay, that Gulf Power was constitutionally entitled to charge Complainants higher annual pole rents. Description of Evidence, 6-7. Accordingly, Complainants are entitled to production of Gulf Power's documents pertaining to its annual pole rent charges to all parties. While Gulf Power incorporates its answers to Interrogatories 40 and 42, which in turn reference certain documents produced, it does not appear that such documents include all communications between Gulf and third persons regarding annual pole rents, and Complainants have no way of knowing what documents Gulf Power is withholding. Further, Complainants believe, from their inspection of Gulf Power documents produced so far, that,

contrary to its representations, Gulf Power has not produced all “make ready orders,” let alone make-ready service requests, time sheets, material costs, and labor costs. Gulf Power has not provided any reason to support its objection of overbreadth and undue burden. Accordingly, Gulf Power’s objection should be overruled and it should be required to produce all responsive documents.

Document Request No. 6:

Produce all documents referring to, relating to, or regarding formal or informal Gulf Power policies or field practices concerning utilization of cross-arms, extension arms, or boxing arrangements.

Gulf Power’s Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants’ Argument:

Gulf Power’s objections on grounds of overbreadth and relevance are not well taken. Gulf Power’s objections of overbreadth and relevance are not well taken. Gulf Power’s ability to establish a constitutional claim for greater compensation depends upon its ability to meet the *Alabama Power* requirement of showing that specific poles are at “full capacity” and cannot accommodate additional attachments. However, Gulf Power, like many electric utilities, uses numerous measures in the normal course of its business to provide sufficient capacity and accommodate additional attachments on poles. Those measures may include the use of “cross-arms, extension arms, or boxing arrangements [attachments on both sides of a utility pole].” Complainants have therefore asked, in this document request for Gulf Power to produce documents that relate to whether it uses such arrangements to provide capacity for its own or third-party attachments. This document request is relevant because, if Gulf Power uses these

measures to provide capacity for itself or others, and such measures can be used on poles that include Complainants' attachments to accommodate new attaching entities, then Gulf Power cannot in fact claim a constitutional entitlement to a higher pole rate based upon the "missed opportunity" that the Eleventh Circuit made clear was a *sine qua non* of any such claim. Furthermore, Gulf Power has not provided any reason or explanation to support its claim of overbreadth. Further, the document request is not overbroad, since it asks only for documents relating to "policies or field practices" concerning Gulf Power's use of cross-arms, extension arms, and boxing arrangements.

Document Request No. 7:

Produce all documents referring to, relating to, or regarding approvals or denials of requests to employ cross-arms, extension arms, or boxing arrangements by Gulf Power or any other entity attaching to Gulf Power-owned or -controlled poles.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Complainants incorporate the same argument as set forth above in connection with Gulf Power's objections to Document Request No. 6.

Document Request No. 8:

Produce all documents referring to, relating to, or regarding pole change-outs performed for Complainant cable operators since 1998, including documents that identify all such work performed, including installed equipment, subcontracts, service requests, work orders, time sheets, and site diagrams or maps.

Gulf Power's Response:

See responses to requests for production number 2 and 4 above.

Complainants' Argument:

Complainants will not move to compel a further response, *provided that* Gulf Power confirms that its response, by incorporating its response, *inter alia*, to Complainants' request number 2, means that Gulf Power has agreed, as it did in response to request number 2 after stating various partial objections, to "make all such documents available."

Document Request No. 9:

Produce all documents referring to, relating to, or regarding pole change-outs necessitated by Gulf Power's core electricity service requirements, including documents that identify all such work performed, including installed equipment, subcontracts, service requests, work orders, time sheets, and site diagrams or maps.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad. Subject to and without waiving this objection, see previously produced documents Bates labeled Gulf Power 00005 – 00809. Gulf Power does not maintain records of each and every pole change-out necessitated by its core business, but such change-outs occur daily in the field.

Complainants' Argument:

Gulf Power's objection of overbreadth is not well taken. In its Description of Evidence, Gulf Power stated that it had evidence regarding instances where it had to change-out a pole for its own core business purposes, "due to capacity, where it would not have needed to do so in the absence of CATV or Telecom attachments." See Description of Evidence, 6 n.13. While the documents Gulf Power references in its answer to Document Request No. 9 refer in part to change-outs for Telecom providers, they do not appear to include any evidence that Gulf Power performed change-outs for its own core business purposes, let alone that Gulf Power was forced to perform un-reimbursed change-outs for its own business purposes on poles containing Complainants' attachments. Gulf Power has a duty to produce the documents containing the

evidence it claimed to have in its Description of Evidence, or, alternatively, admit that it has no such evidence. But it cannot refuse to produce evidence due to an unsubstantiated objection.

Document Request No. 10:

Produce all documents referring to, relating to, or regarding pole change-outs requested by third parties, including but not limited to communications attachers, including documents that identify all such work performed, including installed equipment, subcontracts, service requests, work orders, time sheets, and site diagrams or maps.

Gulf Power's Response:

See responses to requests for production number 2 and 4 above.

Complainants' Argument:

Complainants will not move to compel a further response, *provided that* Gulf Power confirms that its response, by incorporating its response, *inter alia*, to Complainants' request number 2, means that Gulf Power has agreed, as it did in response to request number 2 after stating various partial objections, to "make all such documents available."

Document Request No. 11:

Produce all documents identifying all engineers, technicians, and/or workmen who performed any type of work, labor or service relating to change-outs of Gulf Power-owned or -controlled poles, and identifying the material costs, work, labor, or service that was performed and when it was performed.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information which is not relevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections on grounds of overbreadth, undue burden, and relevance are not well taken. First, as to relevance, Gulf Power itself alleged that the issue of pole change-outs is

relevant to its demand for greater pole compensation when it filed its Description of Evidence. See Description of Evidence, 3-6. If Gulf Power relies upon pole change-outs as a basis for its claims, Complainants are entitled to discover the identity of Gulf Power's personnel who performed pole change-outs, when they were performed, and how much they cost. Second, while the document request is broad, so are Gulf Power's allegations as to the number and scope of the change-outs it claimed, in its Description of Evidence, that it had to perform. Id., 3-6. Indeed, Gulf Power itself stated that "[t]he exact number of change-outs required is not known at this time, as it will require a manual review of hundreds of work orders." Id., 3. Gulf Power should have performed this review, and Complainants are entitled to discover the documents that Gulf Power has relied upon in making such allegations.

Document Request No. 13:

Produce all documents referring to, relating to, or regarding Gulf Power's procedures for changing-out a pole and identify all persons who participated in the development of such procedures.

Gulf Power's Response:

See documents produced herewith as Bates labels Gulf Power 00810 – 00814. These procedures were written by Ben Bowen with input from others at Gulf Power, Power Delivery.

Complainants' Argument:

Gulf Power's response appears to be incomplete. The five pages that it references pertain to an internal Gulf Power "CATV Permitting Procedure," but do not describe "procedures for changing out a pole" For example, the "CATV Permitting Procedure" documents refer to something called a "DSO" that has to be completed when pole make-ready is necessary, but there are no documents concerning what a "DSO" is, how it works, or how the make-ready process actually works.

Document Request No. 14:

Produce all documents referring to, relating to, or regarding Gulf Power's pole inventory records, including but not limited to documents relating to Gulf Power policies and procedures for maintaining its pole inventory.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is vague and ambiguous. Subject to and without waiving these objections, see response to interrogatory number 27.

Complainants' Argument:

Gulf Power's partial objection is not well-taken, and its responsive is evasive and incomplete. Gulf Power must establish a lack of capacity on specific poles in this case as one element of its claim for higher annual pole rent. However, if Gulf Power routinely changes-out bigger poles from its pole inventory for smaller poles; if such change-outs are possible on the poles claimed to be at issue; and if Gulf Power is reimbursed for the costs of such change-outs, then it cannot establish the requisite lack of capacity. This document request is not vague; it clearly and reasonably requests asks for Gulf Power's documents relating to its pole inventory records since 1998 and for the procedures relied upon by Gulf Power in processing poles from its inventory. Gulf Power references its response to interrogatory number 27, and that response lists poles in Gulf Power's "in-service pole inventory" from 1998 through 2003, but Gulf Power has refused to produce any documents relating to its pole inventory or its procedures. Since pole capacity and Gulf Power's procedures for obtaining capacity are issues in this case, as explained above, Gulf Power has a duty to produce its documents relating to its pole inventory records (including those relating to the numbers it listed in response to interrogatory number 27), as well as to produce documents describing its procedures for obtaining poles from its inventory.

Document Request No. 15:

Produce all documents referring to, relating to, or regarding Gulf Power's purchasing, sharing, pooling, or other arrangements for utilizing inventories of poles with affiliated corporations, parents, subsidiaries, and other organizations or operating units.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is vague and ambiguous. Subject to and without waiving these objections, Gulf Power states that it does not utilize pole inventories of other entities, with the exception of the ILECs with whom Gulf Power has joint use agreements. Those joint use agreements, are produced herewith as Bates labels Gulf Power 2089 – 2148.

Complainants' Argument:

Gulf Power's partial objection is not well-taken. Complainants incorporate the same argument regarding the importance of pole capacity determinations set forth above in reply to Gulf Power's objection to Document Request No. 14. In particular, Complainants note that the pages referenced by Gulf Power only comprise joint use agreements, and do not appear to describe Gulf Power's "purchasing, sharing, pooling, or other arrangements for utilizing" pole inventories of Gulf Power's joint use partners. Moreover, Gulf Power is refusing to produce documents showing the actual extent to which it has utilized pole inventories of the entities with which it has joint use agreements.

Document Request No. 16:

Produce all documents referring to, relating to, or regarding the Safety Space and Gulf Power specifications, regulations and/or policies implementing the Safety Space on poles owned or controlled by Gulf Power.

Gulf Power's Response:

See documents produced as Bates labeled Gulf Power 00815 – 00826. Complainants should also have in their possession a current copy of the National Electric Safety Code (“NESC”), since this is a necessary reference for complainants’ field employees. If complainants do have the current (2002) NESC, it can be produced at <http://standards.ieee.org/nesc/>.

Complainants' Argument:

Complainants seek clarification of Gulf Power’s response. In particular, because the dozen or so pages referenced by Gulf Power only contain diagrams, Complainants wish to confirm that Gulf Power has no documents relating to “specifications, regulations and/or policies implementing the Safety Space” other than what it has referenced.

Document Request No. 19:

Produce any and all documents referring to, relating to, regarding or comprising a bona fide development plan or plans, including but not limited to all drafts thereof, that reasonably and specifically projects a need for pole space in the provision of Gulf Power’s core utility service, including all documents that refer or relate to those documents that comprise the bona fide development plan or plans.

Gulf Power's Response:

See documents previously produced by Gulf Power as Bates labels Gulf Power 00005 – 00809.

Complainants' Argument:

Complainants seek clarification that the documents referenced in Gulf Power’s answer, which constitute various “distribution studies,” constitute all of the documents responsive to this request.

Document Request No. 23:

Produce all documents referring to, relating to, or regarding Gulf Power’s upgrades, modernization, or replacement of its poles from 1998 through the present.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad, unduly burdensome, vague, and seeks information which is irrelevant to the hearing issues.

Complainants' Argument:

Gulf Power's objections are not well-taken. This question asks for documents relating to Gulf Power's upgrading or replacement of its poles. If Gulf Power has upgraded or replaced its poles during recent years, such upgrades or replacements could alter the capacity of such poles to accommodate pole attachments. For example, if an older pole is upgraded to a new, stronger pole, the new pole may be able to accommodate additional attachments. Similarly, if an existing pole is replaced with a larger one, the pole's capacity for accommodating attachments is likely to have increased. Any documents regarding policies or procedures that Gulf Power on the upgrading or replacement of its poles would be particularly relevant to pole capacity determinations, as would documents pertaining to the upgrading or replacement of poles containing Complainants' attachments. This is particularly true for poles containing Complainants' attachments. Gulf Power has not provided any explanation or good reason for its objections. Accordingly, the requested documents should be produced.

Document Request No. 24:

Produce all documents referring to, relating to, or regarding the facts, data, calculations and other information that support Gulf Power's claim for a pole attachment rental rate in excess of marginal cost.

Gulf Power's Response:

Gulf Power objects to this request for production on the grounds that it is overly broad and unduly burdensome. Gulf Power will disclose its valuation expert's cost methodologies in accordance with the Presiding Judge's March 30, 2005 Order

Complainants' Argument:

Gulf Power's partial objection is not well-taken, and its answer is evasive and incomplete. As explained in Complainants' reply to Gulf Power's response to Interrogatory Nos. 10 and 38, Complainants are entitled to discover the documents underlying Gulf Power's proffered "just compensation" rate of \$40.60 per pole, a rate that was referenced more than 18 months ago in Gulf Power's "Description of Evidence." Gulf Power's documents pertaining to this claimed rate, or any other rate (above the marginal costs of attachments) to which it claims to be entitled, "should be produced now, not at or near the close of discovery at the end of this year.

Document Request No. 25:

Produce all documents referring to, relating to, or regarding any maps, diagrams, schematics, or depictions of the specific Gulf Power poles that You claim are at "full capacity," "crowded," or have "insufficient capacity" or a "lack of capacity."

Gulf Power's Response:

Gulf Power will produce such documents upon completion of the pole audit being performed by Osmose.

Complainants' Argument:

Gulf Power's answer is evasive and incomplete. In its January 8, 2004 Description of Evidence, Gulf Power claimed to have documents that would be responsive to this request. Indeed, Gulf Power stated that it would "seek to introduce documentary (charts, work orders, etc.) . . . evidence" concerning cable attachments as well as "photographic and engineering evidence depicting attachment arrangements on distribution poles." Complainants submit that, as the Presiding Judge noted in his April 15<sup>th</sup> Order, they have a right to the production of such documentary evidence now.

Document Request No. 26:

Produce all documents referring to, relating to, or regarding any actual losses experienced by Gulf Power that it claims are associated with Complainants' pole attachments on Gulf Power poles, including any documents pertaining to any "higher valued use" or "another buyer of the space waiting in the wings" as described in *Alabama Power v. FCC*.

Gulf Power's Response:

Gulf Power objects to this request on the grounds that it is overly broad and unduly burdensome. Subject to and without waiving these objections, Gulf Power states that actual loss is the difference between Just Compensation and the rate paid by complainants, plus interest.

Complainants' Argument:

Gulf Power's partial objection is not well-taken, and its answer is evasive, incomplete, and strikingly inconsistent with *Alabama Power*. First, as noted above in Complainants' reply to Gulf Power's response to Interrogatory No. 9, inconsistent with *Alabama Power*. In *Alabama Power*, the court made clear that a pole owner who claimed a constitutional right to payment greater than that already provided under the FCC's Cable Rate must show that it was "out . . . more money" and/or that it could identify and quantify one or more "missed opportunities" as a result of having to accommodate cable operators' attachments. See 311 F.3d at 1369-71. Under *Alabama Power*, actual loss refers to actual income or other revenue that Gulf Power has lost that was caused by Complainants' attachments – i.e., greater money offered by a third party that could not be accommodated on Gulf Power's poles or a distinct, quantifiable, actual, and current higher valued use of Gulf Power's own for the same space occupied by Complainants. Gulf Power can't just claim that its "actual" loss is the difference between what they receive and what they want, hypothetically, under just compensation. Gulf Power lost that argument in *Alabama Power*. See 311 F.3d at 1369. Moreover, evidence of losses and lost opportunities is not dependent upon the physical pole inspection that consultant Osmose is conducting. Gulf Power must produce its

evidence of any actual losses and lost opportunities, or admit that they have none and have their claims dismissed immediately.

Document Request No. 27:

Produce all documents referring to, relating to, or regarding the methodologies, formulae, cost accounts, data and/or other bases, if any, used by Gulf Power in calculating or formulating pole attachment rental rates in excess of marginal cost.

Gulf Power's Response:

Gulf Power will work with complainants to reach an agreed-upon a reasonable scope of expert discovery, and produce such agreed-upon documents in accordance with the Presiding Judge's March 30, 2005 Order.

Complainants' Argument:

As noted above in Complainants' reply to Gulf Power's response to Interrogatory No. 39, Gulf Power has refused to answer the question, alleging that it will answer it in accordance with the March 30, 2005 Order. But that Order does not provide a deadline for identifying factual data, cost accounts, formulae, or methodologies that Gulf Power claims underlie its constitutional claim of entitlement to a "just compensation" pole rate of, apparently, \$40.60. The March 30, 2005 Order sets a November 18, 2005 deadline for exchanging summaries of testifying experts, but it in no way justifies Gulf Power to wait until nearly the end of the year until it produces this evidence. Once again, Gulf Power seems to hope that it can delay producing facts to support its claims until practically the close of discovery, thereby trying to preclude Complainants from taking depositions and serving additional written discovery requests to explore the bases of Gulf power's claims.

The Presiding Judge has already made clear that this sort of evasive response is improper. In Gulf Power's January 8, 2004 Description of Evidence, for example, it proffered the rate of \$40.60 as evidence of the rate it is seeking to charge Complainants. This interrogatory seeks to

discover the evidence, if any, supporting this rate and any underlying assumptions. In his Order of April 15, 2005, the Presiding Judge made clear that the fact that Gulf Power may continue to produce additional evidence “does not excuse Gulf Power from providing complete [discovery] answers with respect to the proof it had on January 8, 2004, that relate to its Description of Evidence.”

Document Request No. 28:

Produce all documents referring to, relating to, or regarding negotiations between communications attachers and Gulf Power which discussed, or led to the payment of, pole attachment rental rates exceeding the FCC’s Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power’s Response:

See documents produced in response to interrogatory number 40.

Complainants’ Argument:

Gulf Power’s answer is insufficiently specific and lacks a representation as to whether the documents referenced contain all the documents in Gulf Power’s possession, custody, or control that are responsive to the document request. For example, For example, Gulf Power’s answer to this question about negotiations with “communications attachers” references nearly 1,483 pages of documents listed in response to Interrogatory No. 40, but the identical 1,483 pages are referenced in response to Document Request No. 30 and Interrogatory No. 42, which ask different questions about Gulf Power’s negotiations with “non-Section [47 U.S.C.] 224, non-joint user attachers.” Accordingly, Complainants are entitled to a more careful and more specific response from Gulf Power.

Document Request No. 29:

Produce all documents referring to, relating to, or regarding negotiations between joint users (e.g., an incumbent local exchange carrier) and Gulf Power which

discussed, or led to the payment of, pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

See documents produced in response to interrogatory number 41.

Complainants' Argument:

As Complainants discuss in reply to Gulf Power's response to Interrogatory No. 41, Gulf Power's listing of documents in response to this request lacks a representation as to whether the listed documents contain all the documents in Gulf Power's possession, custody, or control that are responsive to the question. The 59 pages of documents referenced contain only three signed versions of Joint Use Agreements between Gulf Power and BellSouth, Sprint, and GTC, Inc. The pages do not include any drafts, correspondence, memoranda, e-mail, notes, or other documents that might actually "reflect or refer to *negotiations*" between Gulf Power and its joint pole use partners. It is reasonable to believe that some such documents exist. Accordingly, Gulf Power, since it has partial control of joint use poles with such joint users, and such users may therefore have a role in determining and affecting any decisions about such poles' "capacity" for attachments, has a duty to produce documents reflecting the underlying negotiations leading to the referenced joint use agreements.

Document Request No. 30:

Produce all documents referring to, relating to, or regarding negotiations between non-Section 224, non-joint user attachers (*e.g.*, R. L. Singletary, Inc. and Crest Corporation) and Gulf Power which discussed, or led to the payment of, pole attachment rental rates exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

See documents produced in response to interrogatory number 42.

Complainants' Argument:

As Complainants discuss in reply to Gulf Power's response to Interrogatory No. 42, Gulf Power's listing of documents in response to this request is insufficiently specific and lacks a representation as to whether the listed documents contain all the documents in Gulf Power's possession, custody, or control that are responsive to the Interrogatory. For example, Gulf Power's answer to this question about negotiations with "non-Section [47 U.S.C.] 224, non-joint user attachers" references nearly 1,483 pages of documents, but the identical 1,483 pages are referenced in response to Document Request No. 28 and Interrogatory No. 40, which ask different questions about Gulf Power's negotiations with "communications attachers (including Complainants)." Accordingly, Complainants are entitled to a more careful and more specific response from Gulf Power

Document Request No. 31:

Produce all documents referring to, relating to, or regarding cost methodologies, or concepts from or portions of cost methodologies, other than the Sales Comparison Approach, Current Replacement Cost Approach and the Federal Concessions Leasing Model, that Gulf Power may seek to use to determine a pole attachment rental rate exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

To the extent Gulf Power advances other cost methodologies, Gulf Power will produce such documents within the scope of expert discovery agreed-upon by the parties.

Complainants' Argument:

Complainants understand, based upon Gulf Power's response to Interrogatory No. 43, that it does not currently intend to rely upon any valuation method other than those listed in this document request. However, to the extent that Gulf Power seeks to do so, it has a duty to produce documents in response to this document request.

Document Request No. 32:

Produce all documents referring to, relating to, or regarding Gulf Power's application of the Sales Comparison Approach to determine a pole attachment rental rate exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

Gulf Power will produce such documents within the scope of expert discovery agreed-upon by the parties.

Complainants' Argument:

As Complainants discuss in reply to Gulf Power's response to Interrogatory No. 44, Gulf Power's response is evasive and incomplete. Gulf Power utterly refuses to answer this document request at this time. Apparently, once again, Gulf Power is attempting to avoid producing relevant documents until a time at or near the close of discovery. *See* March 30, 2005 Order (re-setting the date for disclosure of expert summaries as November 18, 2005). In its December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the "Sales Comparison Approach." Complainants are entitled to have this document request, which asks for documents relating to Gulf Power's application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

Document Request No. 33:

Produce all documents referring to, relating to, or regarding Gulf Power's application of the Current Replacement Cost Approach to determine a pole attachment rental rate exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

Gulf Power will produce such documents within the scope of expert discovery agreed-upon by the parties.

Complainants' Argument:

As Complainants discuss in reply to Gulf Power's response to Interrogatory No. 47, Gulf Power's response is evasive and incomplete. Gulf Power utterly refuses to answer this document request at this time. Apparently, once again, Gulf Power is attempting to avoid producing relevant documents until a time at or near the close of discovery. *See* March 30, 2005 Order (re-setting the date for disclosure of expert summaries as November 18, 2005). In its December 3, 2004 "Preliminary Statement on Alternative Cost Methodology," Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the "Current Replacement Cost Approach." Complainants are entitled to have this document request, which asks for documents relating to Gulf Power's application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

Document Request No. 34:

Produce all documents referring to, relating to, or regarding Gulf Power's application of the Federal Concessions Leasing Model to determine a pole attachment rental rate exceeding the FCC's Cable or Telecommunications Formula, 47 U.S.C. § 224(d) and (e) and implementing regulations.

Gulf Power's Response:

Gulf Power will produce such documents within the scope of expert discovery agreed-upon by the parties.

Complainants' Argument:

As Complainants discuss in reply to Gulf Power's response to Interrogatory No. 48, Gulf Power's response is evasive and incomplete. Gulf Power utterly refuses to answer this document request at this time. Apparently, once again, Gulf Power is attempting to avoid producing relevant documents until a time at or near the close of discovery. *See* March 30, 2005 Order (re-setting the date for disclosure of expert summaries as November 18, 2005). In its December 3,

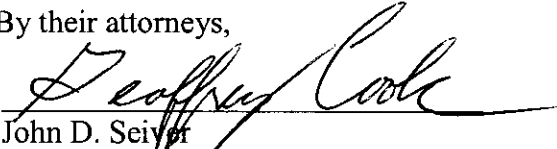
2004 "Preliminary Statement on Alternative Cost Methodology," Gulf Power mentioned that it was considering basing its demand for a higher pole attachment on what it called the "Federal Concessions Leasing Model." Complainants are entitled to have this document request, which asks for documents relating to Gulf Power's application of this valuation method to pole attachment rates, answered now – not at or near the end of discovery.

### CONCLUSION

**WHEREFORE**, on account of the foregoing, Complainants respectfully request that he Court enter an Order compelling Respondent to respond fully to Complainants discovery requests as set forth herein, and award such other relief as is just.

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L.L.C., and BRIGHT HOUSE NETWORKS, L.L.C.**

July 11, 2005

# **EXHIBIT A**

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

FLORIDA CABLE  
TELECOMMUNICATIONS ASSOCIATION,  
INC., COX COMMUNICATIONS GULF  
COAST, L.L.C., *et. al.*

*Complainants,*

v.

GULF POWER COMPANY,

*Respondent.*

E.B. Docket No. 04-381

**COMPLAINANTS' FIRST SET OF INTERROGATORIES TO  
RESPONDENT GULF POWER COMPANY**

The Florida Cable Telecommunications Association, Inc., Cox Communications Gulf Coast, L.L.C., Comcast Cablevision of Panama City, Inc., Mediacom Southeast, L.L.C., and Bright House Networks, L.L.C. ("Complainants"), submit this First Set of Interrogatories to Respondent Gulf Power Company ("Gulf Power" or "Plaintiff"). Respondent must respond in writing within 30 days of the date of service of these Interrogatories.<sup>1</sup> The instructions and definitions that follow are integral to the Interrogatories and should be reviewed carefully.

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<sup>1</sup> *In re Florida Cable Telecommunications Ass'n, Inc., et al. v. Gulf Power Co.*, Order, EB Docket No. 04-381, FCC 05M-03 (issued Feb. 1, 2005).